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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1962

No. 951

JORGE AMERICO UNGO,
Petitioner,
vs.
IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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Subject Index

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement of the case	4
Reasons for granting certiorari	5
1. The decision of the court below in effect holds that the President of the United States had the power to exempt permanent resident aliens from treaty countries from military service after the Congress had directed otherwise in the Universal Military Training and Service Act of 1951	6
2. The decision of the court below is contrary to the decision of this court in Moser v. United States, 341 U.S. 41 (1951)	8
3. The decision of the court below is contrary to the decisions of other Circuit Courts holding the Circuit Courts without original jurisdiction to consider applications for discretionary relief under the Immigration and Nationality Act	11
Conclusions	13

Table of Authorities Cited

Cases	Pages
Blagaic v. Flagg, 304 F.2d 623 (1962)	11
Fong Haw Tan v. Phelan, 333 U.S. 6, 68 S.Ct. 374, 92 L.Ed. 433	13
Foti v. Immigration and Naturalization Service, 308 F.2d 779	11
Giova v. Rosenberg, 308 F.2d 347	11, 12
Holz v. Immigration and Naturalization Service, 309 F.2d 452 (1962)	12
Johnson v. United States, 318 U.S. 189, 87 L.Ed. 704	8
Lam Man Chi v. Bouchard, ... F.2d ..... (3rd Cir. Feb. 26, 1963)	12
Louie King Fong v. Immigration and Naturalization Service, 9 Cir., 308 F.2d 191 (1962)	12
Mai Kai Fong v. Immigration and Naturalization Service, 305 F.2d 239	11
Petition of Carvajal (ND Cal.) 154 F.Supp. 525 (1957)	9
Petition of Rego, 289 F.2d 174 (1961)	7
Roumeliotis v. Immigration and Naturalization Service, 304 F.2d 453 (1962)	11
United States v. Gredzens, 125 F.Supp. 867 (1954)	7
United States v. Rumsa, 212 F.2d 927, Cert. Den. 348 U.S. 838	7
Zupicich v. Esperdy (S.D.N.Y.) 207 F.Supp. 574	11

Statutes	
Immigration and Nationality Act of 1952, Act of June 27, 1952, 66 Stat. 163:	
Section 101(a)(19) (8 U.S.C. 1101(a)(19))	3
Section 106 (as enacted September 26, 1961)	3, 5
Section 106(a) (8 U.S.C. 1105a(a))	11, 14

Pages

Section 212(a)(22) (8 U.S.C. 1182(a)(22)) 2, 3, 4, 6, 10
Section 212(c) (8 U.S.C. 1182(c)) 2, 3, 5, 12
Section 203(a)(1)(A) (8 U.S.C. 1153(a)(1)) 11
Section 241(a)(1) 2, 3, 4
Section 243(h) 11
Section 315 (8 U.S.C. 1426) 3, 6, 9
Section 315(a) 9

Public Law 51, 65 Stat. 75, June 19, 1951, 50 U.S.C. App. 453 Supp. V (1946 Ed.) 3

Selective Service Act of 1948 (Public Law 759, 62 Stat. 604, June 24, 1948) 3, 7

Public Law 87-301, 8 U.S.C.A. Sec. 1105a 3, 5

Universal Military Training and Service Act (Public Law 51, 65 Stat. 75, June 19, 1951, 50 U.S.C. App. 453 Supp. V (1946 Ed.)), Section 4(a) 9

Orders

Executive Order No. 9992, 13 F.R. 5033 3

Executive Order No. 10292, September 28, 1951, 16 F.R. 1843 3, 6

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No.

JORGE AMERICO UNGO, *Petitioner,*

vs.

IMMIGRATION AND NATURALIZATION SERVICE, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

The petitioner, Jorge Americo Ungo, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the decision of the Immigration and Naturalization Service ordering the deportation of petitioner from the United States.

OPINIONS BELOW

The decision of the Immigration and Naturalization Service ordered deportation of the petitioner, pursuant to Section 241(a)(1) of the Immigration and Nationality Act of 1952 (8 U.S.C. 1251 (a)(1)), as an alien ineligible to citizenship under Section 212(a)(22) of the Act (8 U.S.C. 1182 (a)(22)), and denied his request for discretionary relief under Section 212(c), (8 U.S.C. 1182(c)). The opinion of the Court of Appeals has not as yet been officially reported, but is printed in Appendix A hereto, infra, pp. i-vi.

JURISDICTION

The judgment of the Court of Appeals was filed and entered January 10, 1963 (Appendix A, p. vii). Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Did the President of the United States retain the power to exempt permanent resident aliens from military service subsequent to the effective date of the Universal Military Training and Service Act of 1951?

2. Is an alien excludable from the United States where he has not been warned of this consequence prior to being granted an exemption from military service pursuant to a treaty between the United States and the country of which the alien is a national?

3. Does Section 106 of the Immigration and Nationality Act of 1952 (75 Stat. 651, 8 U.S.C.A. 1105a), confer original jurisdiction on the Court of Appeals to review a denial of discretionary relief under Section 212(c) of the Act?

STATUTES INVOLVED

Selective Service Act of 1948 (Public Law 759), 62 Stat. 604, June 24, 1948.

Executive Order No. 9992, 13 F.R. 5033.

Public Law 51, 65 Stat. 75, June 19, 1951, 50 U.S.C. App. 453 Supp. V (1946 Ed.);

Executive Order No. 10292, September 28, 1951, 16 F.R. 1843;

Immigration and Nationality Act of 1952, Act of June 27, 1952, 66 Stat. 163:

Section 101(a)(19); (8 U.S.C. 1101(a)(19));

Section 106 (as enacted September 26, 1961), Public Law 87-301, 8 U.S.C.A. Sec. 1105a;

Section 212(a)(22), (8 U.S.C. 1182(a)(22));

Section 212(c), (8 U.S.C. 1182(c));

Section 241(a)(1);

Section 315 (8 U.S.C. 1426);

(The foregoing pertinent statutes are set forth in Appendix B, hereto, infra, p. viii).

STATEMENT OF THE CASE

Petitioner is a native and citizen of El Salvador. He was admitted to the United States for permanent residence for the first time on September 9, 1948. He was readmitted to the United States for permanent residence on September 5, 1952, March 2, 1958 and December 19, 1959.

Petitioner registered for selective service on September 27, 1949. He was found acceptable for induction. On October 21, 1952, the Embassy of El Salvador requested that the Secretary of State of the United States defer petitioner from military service. On November 26, 1952 the application was approved. Petitioner was thereupon classified IV-C as an alien exempt from service. Thereafter, and on May 20, 1953, the Selective Service Board sent petitioner Form C-294 (Request for Exemption from Military Service), with instructions to sign and return to the Board, which was done on June 15, 1953. The petitioner's Selective Service classification remained IV-C, as a Treaty Alien.

An Order to Show Cause was issued by the Immigration and Naturalization Service on November 14, 1960, charging petitioner as subject to deportation pursuant to Section 241(a)(1), (8 U.S.C. 1251 (a)(1)), (see Appendix B), in that at the time of his last entry (December 19, 1959) he was excludable as an alien ineligible to citizenship under Section 212(a)(22) of the Act (8 U.S.C. 1182(a)(22)). (Appendix B). A hearing was held by the Immigration and Naturalization Service at San Francisco, California,

and the Special Inquiry Officer sustained the charge. A request for discretionary relief under Section 212 (c), (8 U.S.C. 1182(c)) was denied. (Appendix B). On July 11, 1961 the Board of Immigration Appeals dismissed the appeal.

A Petition for Review of this decision was filed in the United States District Court in and for the Northern District of California, Southern Division, on August 18, 1961, and such petition was transferred, without hearing, to the Court of Appeals for the Ninth Circuit, pursuant to 8 U.S.C. Section 1105a, Act of September 26, 1961, 75 Stat. 651. The Court of Appeals rendered its decision affirming the order of deportation of the Immigration and Naturalization Service, judgment entered January 10, 1963 (Appendix A, infra, p. vii).

REASONS FOR GRANTING CERTIORARI

This writ of certiorari is sought because the issues in this case raise important questions of interpretation of the Universal Military Training and Service Act of 1951, the Executive Orders purporting to implement this law, the Immigration and Nationality Act of 1952 as it relates to aliens exempted from military service, and Section 106 of said Act relating to original jurisdiction given to Courts of Appeal by the 1961 amendment. In addition, the decision below is in conflict with decisions of the Court below as well as decisions of other Circuits.

1. THE DECISION OF THE COURT BELOW IN EFFECT HOLDS THAT THE PRESIDENT OF THE UNITED STATES HAD THE POWER TO EXEMPT PERMANENT RESIDENT ALIENS FROM TREATY COUNTRIES FROM MILITARY SERVICE AFTER THE CONGRESS HAD DIRECTED OTHERWISE IN THE UNIVERSAL MILITARY TRAINING AND SERVICE ACT OF 1951.

The Universal Military Training and Service Act of 1951 enumerated certain classes of aliens exempt from training and military service. (Appendix B, p. xii). This section contains the express language that "aliens admitted for permanent residence in the United States shall not be so exempted." Despite this language the President of the United States issued Executive Order 10292 (Appendix B, p. xiv) exempting permanent resident *treaty aliens* from such service. The Selective Service Regulations incorporated the provisions of this order.

Petitioner, although a permanent resident of the United States, as an alien from El Salvador which had a treaty with the United States exempting its nationals from military service in the United States, was classified exempt from military service. It is contended that the President of the United States exceeded his power in Executive Order 10292 in purporting to exempt *treaty aliens* from military service. Therefore, the "exemption" was a nullity. Accordingly, the bar against obtaining United States citizenship prescribed by Section 315 of the Immigration and Nationality Act of 1952 (Appendix B), is inapplicable. Likewise, the exclusion bar of Section 212 (a)(22), (Appendix B), of the Act is inapplicable.

In *United States v. Rumsa,* 212 F.2d 927, 932, Cert. Den. 348 U.S. 838, the Court of Appeals for the Seventh Circuit interpreting the exemption provisions of said Act held that permanent resident aliens were not exempt from military training after the 1951 amendments, whether *treaty aliens* or not. In *Petition of Rego,* 289 F. 2d 174 (1961), the Court of Appeals for the Third Circuit considered the same question and held that the 1951 amendments to the Selective Service Act of 1948 eliminated exemptions for all permanent resident aliens, including *treaty aliens.* The Court said (pp. 176-177):

> "We read the final clause of the section as meaning that a formal request for exemption by a member of the class of aliens authorized to obtain such relief on application debarred the applicant from future naturalization. Indeed, the reference in that clause to 'any alien who makes such application logically included only aliens who were not permanent residents, for only they were authorized to claim this exemption. Thus, the debarment clause, like the exemption clause which it qualified, simply did not pertain to the alien who had acquired permanent residence and had been in the same selective service category as a citizen."

In *United States v. Gredzens,* 125 F. Supp. 867, (1954), the District Court in Minnesota followed the *Rumsa* decision, supra, holding at page 871:

> "Upon such further consideration, the Government's objection has been sustained. As the defendant in this case was an alien admitted for

permanent residence in the United States, he was by Act of Congress declared ineligible for exemption as an alien. Therefore, the procedures set forth in this memorandum are inapplicable to him, and as to him they are void.

"It is well established that regulations of a department cannot have the effect of amending the law; they may aid in carrying the law, as it exists, into execution, but they cannot change its positive provisions. U.S. v. Two Hundred Barrels of Whiskey, 95 U.S. 571, 24 L. Ed. 491."

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2. THE DECISION OF THE COURT BELOW IS CONTRARY TO THE DECISION OF THIS COURT IN MOSER v. UNITED STATES, 341 U.S. 41 (1951).

The *Moser* decision established the proposition that to bar an alien from citizenship because of an exemption from military service, "nothing less than an intelligent waiver is required by elementary fairness. *Johnson v. United States*, 318 U.S. 189, 197, 87 L. Ed. 704. To hold otherwise would be to entrap petitioner." Here, petitioner was informed by his Consul of the treaty between his country and the United States, by which nationals of each country were exempted from military service in the other country. The El Salvador Embassy in Washington requested a "deferment" for petitioner, and pursuant thereto the United States Department of State granted this request. Petitioner was then classified IV-C by the local selective service board as a *treaty alien* on February 10, 1953. On May 20, 1953, the local board sent petitioner Form C-294

with a letter advising that it must be signed and returned to the local board if he wanted to be considered for exemption from military service as a treaty alien, calling attention to Section 315 of the Immigration and Nationality Act. (8 U.S.C.A. 1426). Thus, four months *after* petitioner was classified IV-C by the Selective Service Board he was for the first time warned of the citizenship bar of Section 315(a) of the Immigration and Nationality Act of 1952 and Section 4(a) of the Universal Military Training and Service Act, Public Law 51, 65 Stat. 75, June 19, 1951, 50 U.S.C. App. 453 Supp. V (1946 Ed.) (Appendix B). By this late date, according to Judge Goodman in *Petition of Carvajal*, (ND Cal., 154 F. Supp. 525), 1957, he was already barred from citizenship. As Judge Goodman said, at page 528:

> "There is considerable justification for petitioner's contention that he was misled as to the significance of Form C-294. For it does not appear that this form served any purpose whatsoever. It constituted no more than a reiteration of a request for exemption from military service as a treaty alien which had previously been made and granted * * *."

Under the *Moser* test, petitioner did not have an opportunity to make an intelligent waiver by a standard of elementary fairness. By the time he was first informed of the effect of ineligibility for citizenship *after* being exempted from military service as a treaty national, he was already barred from citizenship according to *Petition of Carvajal*, supra. In other

words, he was barred if he did, and he was barred if he did not comply with the Selective Service Board's request to execute the Form C-294.

It is further contended that the Court below erred in not finding that the *Moser* doctrine requires the Government to warn a prospective applicant for exemption from military service that if he selects exemption he will not only not be eligible for citizenship but also that he will be barred from ever returning to the United States for permanent residence in view of Section 212(a)(22) of that Act (Appendix B). Petitioner here first learned of this disability one year *after* he was last admitted to the United States, when he was served with the Order to Show Cause in deportation hearing proceedings. The standard of "elementary fairness" prescribed by *Moser* dictates that the Government should warn of this disastrous consequence to aliens claiming military exemption under a Treaty with the United States.

3. THE DECISION OF THE COURT BELOW IS CONTRARY TO THE DECISIONS OF OTHER CIRCUIT COURTS HOLDING THE CIRCUIT COURTS WITHOUT ORIGINAL JURISDICTION TO CONSIDER APPLICATIONS FOR DISCRETIONARY RELIEF UNDER THE IMMIGRATION AND NATIONALITY ACT.

In *Foti v. Immigration and Naturalization Service*, (308 F.2d 779), the Court of Appeals for the Second Circuit en banc held that that Court did not have original jurisdiction under Section 106(a) of the Immigration and Nationality Act (8 U.S.C. 1105a(a)) (Appendix B) to review an order of the Immigration and Naturalization Service denying petitioner's application for the discretionary relief of suspension of deportation. The Court cited with approval the decision of *Zupicich v. Esperdy*, S.D.N.Y., 207 F. Supp. 574, and declined to follow the decisions of the Seventh Circuit in *Blagaic v. Flagg*, 304 F.2d 823 (1962), and *Roumeliotis v. Immigration and Naturalization Service*, 304 F.2d 453 (1962). The *Blagaic* case relates to the discretionary relief of withholding of deportation under Section 243(h) of the Immigration and Nationality Act of 1952, and *Roumeliotis* to denial of a first preference visa under Section 203 (a)(1)(A), 8 U.S.C. 1153(a)(1). The *Zupicich* decision, interestingly enough, called attention to two decisions of the Ninth Circuit—*Giova v. Rosenberg*, 308 F.2d 347, concerning a motion to reopen deportation proceedings, and *Mai Kai Fong v. Immigration and Naturalization Service*, 305 F.2d 239, holding at page 242:—"Only final orders of deportation are subject to direct review in courts of appeals pursuant to 8 U.S.C.A., Section 1105a (a)." Citing *Giova v.*

Rosenberg, 9 Cir., 308 F.2d 347, decided June 15, 1962. (But see *Louie King Fong v. Immigration and Naturalization Service*, 9 Cir., 308 F2d 191, 1962). Also see *Lam Man Chi v. Bouchard*, ... F.2d ....., decided February 26, 1963, where the Court of Appeals for the Third Circuit held that a review of the Attorney General's designation of the place of deportation must be had in the United States District Court and was not within the exclusive jurisdiction conferred on Courts of Appeals by the 1961 enactment. See *Holz v. Immigration and Naturalization Service*, 309 F.2d 452 (1962) where the Court of Appeals for the Ninth Circuit refused to take original jurisdiction to review an application for a stay of deportation.

The Court below, contrary to these decisions limiting Courts of Appeals' original jurisdiction to review of final orders of deportation, concluded that it had original jurisdiction under the 1961 Act to review the requested discretionary relief under Section 212(c) of the Immigration and Nationality Act (8 U.S.C. 1182(c)). Because of this conflict in decisions it is submitted that certiorari is appropriate.

CONCLUSIONS

I

Where the President of the United States acts in excess of his power purporting to allow military exemptions in direct contradiction to a statute of Congress forbidding such exemptions, a question of grave importance is presented for the consideration of this Court. The purported exercise of this power gave an illusory and illegal "exemption" to thousands of alien permanent residents of the United States. It is contended that the question so presented can only be settled by a decision of this Court.

II

The decision of this Court in *Moser v. United States* set out a fair waiver standard to be applied in military exemption cases, and where the alien is exempted and then informed of its effect, as here, this standard has not been met. Further, it is urged that the government has a duty in applying this fair waiver standard to warn the alien of the true price which must be paid for the purchase of such an exemption—not only ineligibility to citizenship, but ineligibility to return to the United States for permanent residence if he ever departs therafter. As stated by Mr. Justice Douglas in *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10, 68 S. Ct. 374, 92 L. Ed. 433:

> "We resolve the doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment or exile. Delgadillo v. Carmichael, 332 U.S. 388 (68 S. Ct. 10, 92 L. Ed. 17)."

III

Finally, the question of the extent of original jurisdiction of the Circuit Courts of Appeal under Section 106(a) of the Immigration and Nationality Act (8 U.S.C. 1105a(a), Act of September 26, 1961, 75 Stat. 651), remains to be settled. The conflicts among the decisions of the Second, Third, Seventh and Ninth Circuits relating to what is encompassed by the words of the Act "all final orders of deportation" must be resolved. Only a decision of this Court can settle the issue.

For the reasons set forth, it is respectfully submitted that this petition for writ of certiorari should be granted.

Dated, San Francisco, California,
March 18, 1963.

GORDON G. DALE,
Attorney for Petitioner.

JACKSON & HERTOGS,
Of Counsel.

(Appendices A and B Follow)

Appendix A

United States Court of Appeals
for the Ninth Circuit

Jorge Americo Ungo, Petitioner, vs. Charles J. Beechie, District Director, San Francisco District, Immigration and Naturalization Service, Respondent.	No. 17,845 Jan. 10, 1963

Petition to review an order of the
Immigration and Naturalization Service

Before: Jertberg, Magruder and Browning, Circuit Judges.

Magruder, Circuit Judge.

This is a judicial review, pursuant to 8 U.S.C. § 1105a, as amended of a deportation order against petitioner issued by the Immigration and Naturalization Service. An appeal to the Board of Immigration Appeals was dismissed.

Petitioner Ungo is a native and citizen of the Central American country of El Salvador. He was born June 17, 1930. On September 9, 1948, he was first admitted to the United States as a "permanent resi-

'dent." A year later he registered under the Selective Service System. He was classified IV-E, a student. He departed for El Salvador in July, 1950, and returned two months later, this time as a non-immigrant student who, in that capacity, was not subject to the Draft Act. However, petitioner claims that he did not know that fact, nor did he know the intricacies of the applicable statute. Notwithstanding his classification IV-E, a student, on his return to the United States in September, 1950, he found awaiting him the notice calling him to serve in the United States Army because he was a "permanent resident." He explained to his draft board that was a IV-E student. The Selective Service System thereupon "dismissed my issue to serve in the United States Army." His classification was changed to IV-C.

In August, 1952, he went to El Salvador and shortly afterwards he came back to the United States, this time for "permanent residence." On October 10, 1952, his draft board classified Ungo I-A.

On October 21, 1952, the El Salvador Embassy at his instance requested the Secretary of State of the United States to approve an application for "deferment."

On February 1, 1953, Ungo wrote to his local draft board, acknowledging the receipt of a letter in which he had been notified of the favorable action by the Department of State on his application for "deferment." In this letter he stated, "Therefore, I desire to be classified in class IV-C as a treaty alien." On February 10, 1953, Ungo was put in classification

IV-C by his draft board. When the registrant's file was reviewed on May 20, 1953, the director of the Selective Service System having written that "Unless there is already on file a request for relief from military service as a treaty alien by the registrant, he should be required to submit such signed request prior to classification in Class IV-C." Form C-294 was mailed to Ungo. This form set forth the provision of § 315 of the Immigration and Nationality Act of 1952, which is in substance that an alien who applies for exemption from military service on the ground that he is an alien and who is "relieved" from such service on such ground shall be permanently ineligible to become a citizen of the United States. This may seem to some to be a harsh consequence of claiming the exemption, but it is one the Congress is plainly authorized to impose.

The content of § 315 was clearly printed upon the face of Form C-294. The record discloses that appellant is an intelligent person, a college graduate, who has excellent command of the English language. The special inquiry officer who heard the case wrote that appellant was obviously "not being entirely truthful" in saying that he signed the form in ignorance of its provisions. The Board of Immigration Appeals affirmed the finding of the special inquiry officer to the effect that Ungo knew what he was doing when he signed Form C-294 and that he thereby made a "voluntary and intelligent election between eligibility for citizenship and exemption from military service." It does not do to say that appellant had already at the

time he signed Form C-294 been granted classification IV-C as a treaty alien, and that hence his signing the form was a superfluity and irrelevant. The state director of the Selective Service System wrote on June 24, 1959, "By signing Form C-294, the registrant remained exempt from training and service in the Armed Forces of the United States and he retained his exempt classification."

Furthermore, factually speaking, the action by the draft board in classifying petitioner in category IV-C as a treaty alien relieved him of service in the army, and, as the Second Circuit said in *Petition of Skender*, 248 F.2d 92, at 95 (1957), under § 315(a) it is not required that the applicant should be "legally entitled" to be relieved from the service; "it is the fact of relief, not the legal right to it, that is determinative." See to the same effect *United States ex rel. Mario Rosio v. Shaughnessy*, 134 F. Supp. 217 (S.D. N.Y. 1954); *In re Carvajal*, 154 F. Supp. 525 (N.D. Cal. 1957).

Moser v. United States, 341 U.S. 41 (1951), is manifestly inapplicable, for in that case the alien was expressly advised by his consulate that signing the exemption would not affect his eligibility to become a United States citizen; the Supreme Court held that in these circumstances the alien had not "knowingly and intentionally" waived his right to become an American citizen. The present case, on its facts, is quite different.

Another somewhat technical argument made by appellant is that the President of the United States

lacked the power to grant exemption from military service to permanent resident aliens after the 1951 amendments to the Selective Service Act of 1948, and therefore that such attempted exemption was a "nullity." We find nothing in § 6(a) of the 1948 Act, as amended in 1951, nor anything in the regulation by the President, 32 CFR 1622 *et seq.*, necessarily contrary to the earlier treaty between the United States and El Salvador. Repeals by implication are not favored by the law. See *United States v. Lee Yen Tai*, 185 U.S. 213 (1902); *Johnson v. Browne*, 205 U.S. 309 (1907); *Cook v. United States*, 288 U.S. 102 (1933). The earlier provisions of the treaty with El Salvador have not been repealed by implication, and we see no objection to applying § 315 of the Immigration and Nationality Act of 1952. We do not see that the holdings in *United States v. Rumsa*, 212 F.2d 927 (C.A. 7th, 1954), and in *Petition of Rego*, 289 F.2d 174 (C.A. 3d, 1961), are inconsistent with this conclusion.

The last entry of the appellant into the United States occurred on December 19, 1959. It was a mistake to have issued the visa to him at this time under § 212(a)(22), and he should now be deported according to § 241(a) of the Immigration and Nationality Act of 1952. Appellant asserts that the principle of *Moser v. United States*, supra, 341 U.S. 41, should be applicable here, and that since the record does not indicate that petitioner was ever informed of the danger that if he claimed the exemption under § 315 he would be barred from returning to the United

States when he last left this country, he should not be held to have made "a voluntary and intelligent election" under the Act. Appellant having knowingly and intentionally waived his right to become an American citizen, we think it need not also appear that he was expressly advised of all the consequences which might flow from that waiver under other provisions of the Immigration and Nationality Act.

We hold also that the Board of Immigration Appeals made no error in its ruling to the effect that the alternative discretionary relief requested under § 212 (c) was properly denied by the special inquiry officer on the ground that it is a condition of this section that the alien must have been returning to "a lawful unrelinquished domicile of seven consecutive years." The alien left the United States in 1954 for El Salvador to obtain some "field experience," as he said. However, it appears that at the end of his first employment in El Salvador he received a second job and then a third for a brief period, and he stated at the hearing on February 23, 1961, that he returned to the United States in 1957 only "for vacation." We agree that the alien cannot show that at the time of his 1958 entry he was returning to "a lawful unrelinquished domicile of seven consecutive years."

A judgment will be entered affirming the order of deportation of the Immigration and Naturalization Service.

(Endorsed) Opinion Filed Jan. 10, 1963.

Frank H. Schmid, Clerk

United States Court of Appeals
for the Ninth Circuit

Jorge Americo Ungo, Petitioner, vs. Charles J. Beechie, District Director, etc., Respondent.	No. 17,845

JUDGMENT

Upon Petition to Review an order of the Immigration and Naturalization Service.

This Cause came on to be heard on the Transcript of the Record from the Immigration and Naturalization Service and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the order of the said Immigration and Naturalization Service in this Cause be, and hereby is affirmed.

Filed and entered January 10, 1963.

Appendix B

Selective Service Act of 1948 (Public Law 759), 62 Stat. 604, June 24, 1948:

Registration

Section 3. "Except as otherwise provided in this title, it shall be the duty of every male citizen of the United States, and every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder."

Training and Service

Section 4(a). "Except as otherwise provided in this title, every male citizen of the United States, and every other male person residing in the United States, who is between the ages of nineteen and twenty-six, at the time fixed for his registration, or who attains the age of nineteen after having been required to register pursuant to Section 3 of this title, shall be liable for training and service in the armed forces of the United States. Any citizen of a foreign country, who is not deferable or exempt from training and service under the provisions of this title (other than this subsection), shall be relieved from liability for training and service under this title if, prior to his

induction into the armed forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President; but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States.

Section 4(b). Each person inducted under the provisions of subsection (a) shall serve in the armed forces for a period of twenty-one consecutive months, unless sooner discharged in accordance with standards and procedures prescribed by the Secretary of Defense."

DEFERMENT AND EXEMPTIONS

Section 6(a). "Commissioned officers, warrant officers, pay clerks, enlisted men, and aviation cadets of the Regular Army, the Navy, the Air Force, the Marine Corps, the Coast Guard, the Coast and Geodetic Survey, and the Public Health Service; cadets, United States Coast Guard Academy; members of the reserve components of the armed forces, the Coast Guard, and the Public Health Service, while on active duty; and foreign diplomatic representatives, technical attaches of foreign embassies and legations, consuls general, consuls, vice consuls, and other consular agents of foreign countries who are not citizens of the United States, and members of their families, and persons in other categories to be specified by the President, residing in the United States, and who have not declared their intention to become citizens of the United States, shall not be required to be registered

under Section 3 and shall be relieved from liability for training and service under Section 4(b)."

Executive Order No. 9992
13 F. R. 5033

§ 622.18 "Class IV-C: Aliens. (a) In Class IV-C shall be placed any registrant who is an alien and who has not declared his intention to become a citizen of the United States and who—

(1) Has entered the United States for a specific temporary purpose which would normally be concluded within six months, has not been gainfully employed during his stay in the United States, and continues to pursue the purpose for which he entered; or

(2) Has, under requirements mutually agreeable to the Secretary of State, the Commissioner of Immigration and Naturalization, and the Director of Selective Service, entered the United States temporarily for the purpose of study, teaching, practical training, or research in agriculture, industry, commerce, public health, education, or in related fields, and continues to satisfactorily pursue such endeavor.

(b) In Class IV-C shall be placed any registrant who is an alien and who has not declared his intention to become a citizen of the United States and who is a national of a country with which there is in effect a treaty or international agreement exempting nationals of that country from military service while they are within the United States and for whom an application for deferment has been communicated to the De-

partment of State by the government of that country and has been approved by the Department of State.

(c) In Class IV-C shall be placed any registrant who is an alien who, prior to his induction, has made application to be relieved from liability for training and service in the armed forces of the United States by filing with the local board an Application by Alien for Relief from Military Service (SSS Form No. 130), executed in duplicate. The local board shall forward the original of such form to the Director of Selective Service to the State Director of Selective Service and shall retain the duplicate in the registrant's Cover Sheet (SSS Form No. 101).

(d) In Class IV-C shall be placed any registrant who is an alien and because of his nationality is within a class of persons not acceptable to the armed forces of the United States for training and service.

(e) In Class IV-C shall be placed any registrant who is an alien and has departed from and is no longer residing in the United States. Such alien shall be placed in Class IV-C even though he is a delinquent but this classification shall in no way relieve him from liability for prosecution for violation of the selective service law. If any registrant so classified under this paragraph returns to the United States to reside therein his classification shall be reopened and he shall be classified anew. Issued August 28, 1948.

Harry S. Truman."

Public Law 51, 65 Stat. 75, June 19, 1951, 50 USC App. 453 Supp. V (1946 Ed.):

UNIVERSAL MILITARY TRAINING AND SERVICE ACT

Section 1. The Selective Service Act of 1948 (62 Stat. 604), as amended is further amended as follows:

(a) Section 1(a) of such Act is amended to read as follows:

"SECTION 1. (a) This Act may be cited as the 'Universal Military Training and Service Act.'"

(c) Section 3 of such Act is amended to read as follows:

"SEC. 3. Except as otherwise provided in this title, it shall be the duty of every male citizen of the United States, and every other male person now or hereafter in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit registration at such time or times and place or places and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder."

(d) Section 4(a) of such Act is amended to read as follows:

"(a) Except as otherwise provided in this title, every male citizen of the United States and every male alien admitted for permanent residence, who is between the ages of 18 years and 6 months and 26 years at the time fixed for his registration, or who attains the age of 18 years and 6 months after having been required to register pursuant to section 3 of this title, or who is

otherwise liable as provided in section 6(h) of this title, shall be liable for training and service in the Armed Forces of the United States: *Provided,* That each registrant shall be immediately liable for classification and examination, and shall, as soon as practicable following his registration, be so classified and examined, both physically and mentally, in order to determine his availability for induction for training and service in the Armed Forces: Provided further, That any male alien who is between the ages of 18 years and 6 months and 26 years, at the time fixed for registration, or who attains the age of 18 years and 6 months after having been required to register pursuant to section 3 of this title, or who is otherwise liable as provided in section 6(h) of this title, who has remained in the United States in a status other than that of a permanent resident for a period exceeding one year (other than an alien exempted from registration under this title and regulations prescribed thereunder) shall be liable for training and service in the Armed Forces of the United States, except that any such alien shall be relieved from liability for training and service under this title if, prior to his induction into the Armed Forces he had made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President; but any alien who makes such application shall thereafter be debarred from becoming a citizen of the United States."

(1) Section 6(a) of such Act is amended to read as follows:

"(a) Commissioned officers, warrant officers, pay clerks, enlisted men, and aviation cadets of the Regular Army, the Navy, the Air Force, the Marine Corps, the Coast Guard, the Coast and Geodetic Survey and the Public Health Service; cadets, United States Military Academy; midshipmen, United States Navy; cadets, United States Coast Guard Academy; midshipmen, Merchant Marine Reserve, United States Naval Reserves; students enrolled in an officer procurement program at military colleges the curriculum of which is approved by the Secretary of Defense; members of the reserve components of the Armed Forces, the Coast Guard, and the Public Health Service, while on active duty; and foreign diplomatic representatives, technical attaches of foreign embassies and legations, consuls general, consuls, vice consuls and other consular agents of foreign countries who are not citizens of the United States, and members of their families, and persons in other categories to be specified by the President who are not citizens of the United States, *shall not be required to be registered under section 3 and shall be relieved from liability for training and service under section 4, except that aliens admitted for permanent residence in the United States shall not be so exempted.*"

Executive Order No. 10292
September 28, 1951, 16 F. R. 1843

* * *

Sec. 1622.42 Class IV-C: *Aliens.* (a) In Class IV-C shall be placed any registrant who is an alien and who has not been admitted to the United States

for permanent residence and who has not remained in the United States for a period exceeding one year. When such a registrant has been within the United States for two or more periods of less than one year and the total of such periods exceeds one year, he shall be deemed to have remained in the United States for a period exceeding one year. In computing the length of such periods, any portion of one day shall be counted as one full day. When any such registrant has remained in the United States for a period exceeding one year, he becomes liable for training and service in the Armed Forces of the United States and shall be classified as available for military service unless he is found to be eligible for another classification for a reason other than his alien status.

(b) In Class IV-C shall be placed any registrant who is an alien and who has not been admitted to the United States for permanent residence but who has remained in the United States for a period exceeding one year and who has, prior to his induction, made application to be relieved from liability for training and service in the Armed Forces of the United States by filing with the local board an Application by Alien for Relief from Training and Service in the Armed Forces (SSS Form No. 130), executed in duplicate. The local board shall forward the original of such form to the Director of Selective Service through the State Director of Selective Service and shall retain the duplicate in the registrant's Cover Sheet (SSS Form No. 101).

(c) In Class IV-C shall be placed any registrant who is an alien and who is certified by the Department of State to be, or otherwise establishes that he is exempt from military service under the terms of a treaty or international agreement between the United States and the country of which he is a national.

(d) In Class IV-C shall be placed any registrant who is an alien and who has departed from the United States. Such alien shall be placed in Class IV-C even though he is a delinquent but this classification shall in no way relieve him from liability for prosecution for violation of the selective service law. If any registrant so classified under this paragraph returns to the United States, his classification shall be reopened and he shall be classified anew.

Immigration and Nationality Act 1952,
Act of June 27, 1952, 66 Stat. 163

Section 101(a)(19): (8 USC 1101(a)(19)) provides:

> "The term 'ineligible to citizenship,' when used in reference to any individual, means, notwithstanding the provisions of any treaty relating to military service, an individual who is, or was at at any time, permanently debarred from becoming a citizen of the United States under Section 3(a) of the Selective Training and Service Act of 1940, as amended (54 Stat. 855; 55 Stat. 844), or under Section 4(a) of the Selective Service Act of 1948, as amended (62 Stat. 605, 65 Stat. 76), or under any section of this Act, or any other Act, or under any law amendatory of, supplementary to, or in substitution for, any of such sections or Acts."

Section 106 (8 USC 1105a) provides that the procedure prescribed by 5 U.S.C.A. Sections 1031-42 shall be:

> "the sole and exclusive procedure for the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title * * * (8 U.S.C.A.)".

5 U.S.C.A. Sections 1013-42 provide for the initial judicial review by courts of appeals of specified final orders issued by certain administrative agencies such as the Federal Power Commission, the Secretary of Agriculture, the United States Maritime Commission, and the Atomic Energy Commission.

Section 212(a)(22); (8 USC 1182(a)(22)) provides:

> "(22) Aliens who are ineligible to citizenship, except aliens seeking to enter as nonimmigrants; or persons who have departed from or who have remained outside the United States to avoid or evade training or service in the armed forces in time of war or a period declared by the President to be a national emergency, except aliens who were at the time of such departure nonimmigrant aliens and who seek to reenter the United States as nonimmigrants;"

Section 212(c); (8 USC 1182(c)) provides:

> "(c) Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished

domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraph (1) through (2) and paragraphs (3) and (31) of subsection (a). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 211(b)."

Section 241(a) (1) provides:

"Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

"(1) at the time of entry was within one or or more of the classes of aliens excludable by the law existing at the time of such entry."

Section 315 (8 USC 1426) provides as follows:

"(a) Notwithstanding the provisions of Section 405(b) any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien and is or was relieved or discharged from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States.

(b) The records of the Selective Service System or of the National Military Establishment shall be conclusive as to whether an alien was relieved or discharged from such liability for training or service because he was an alien."

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statutes and order involved	2
Statement	2
Argument	6
Conclusion	15
Appendix	16

CITATIONS

Cases:	
Carvajal, Petition of, 154 F. Supp. 525	10
Cook v. *United States*, 288 U.S. 102	10
Foti v. *Immigration and Naturalization Service*, certiorari granted, 371 U.S. 947	14
Hurn v. *Ousler*, 289 U.S. 238	14
Johnson v. *Browne*, 205 U.S. 309	9–10
Lefson v. *Esperdy*, 211 F. Supp. 769	13
Moser v. *United States*, 341 U.S. 41	10, 11, 12
Rego, Petition of, 289 F. 2d 174	8
Romero v. *International Terminal Operating Co.*, 358 U.S. 354	14
Rosio, United States ex rel. v. *Shaughnessy*, 134 F. Supp. 217	10
Schenkel v. *Landon*, 133 F. Supp 305	8, 10
Skender, In re, 248 F. 2d 92	10
Taussig v. *Wellington Fund, Inc.*, 313 F. 2d 472	14
United States v. *Gredzens*, 125 F. Supp. 867	8
United States v. *Lee Yen Tai*, 185 U.S. 213	9
United States v. *Rumsa*, 212 F. 2d 927, certiorari denied, 348 U.S. 838	8

Treaty and statutes:

Treaty of February 22, 1926, between the United States and El Salvador, 46 Stat. 2817 — Page 6

Immigration and Nationality Act of 1952, 66 Stat. 163, as amended, 75 Stat. 650, *et seq.*:

- Section 101(a)(19) (8 U.S.C. 1101(a)(19)) — 18
- Section 106(a) (8 U.S.C. (Supp. III) 1105a(a)) — 13, 14, 18
- Section 212(a) (8 U.S.C. 1182(a)) — 7, 19
- Section 212(c) (8 U.S.C. 1182(c)) — 14, 19
- Section 241(a) (8 U.S.C. 1251(a)) — 7, 19
- Section 315 (8 U.S.C. 1426) — 3, 4, 7, 11, 20

Selctive Service Act of 1948, 62 Stat. 604, Section 6(a) — 7

Universal Military Training and Service Act of 1951, 65 Stat. 75 (50 U.S.C. App. (1946 ed. Supp V) 453):

- Sec. 3 — 16
- Sec. 4(a) — 8, 16
- Sec. 6(a) — 7, 8, 17

Miscellaneous:

Executive Order No. 10292 of September 25, 1954, 16 Fed. Reg. 9843 — 6, 7, 20

Executive Order 10659 (3 C.F.R. (1956 Supp.) 59) — 6

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 951

JORGE AMERICO UNGO, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 311 F. 2d 905.

JURISDICTION

The judgment of the court of appeals was entered on January 10, 1963. The petition for a writ of certiorari was filed on March 25, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the President had the authority to exempt an alien admitted for permanent residence from selective service pursuant to a treaty with the alien's homeland providing for such an exemption.

2. Whether petitioner applied for and received exemption from selective service as an alien, with knowledge that he would thereby become permanently ineligible for citizenship under Section 315 of the Immigration and Nationality Act.

3. Whether a court of appeals, which has original jurisdiction as to the administrative finding of deportability, has pendant jurisdiction to review initially the denial of discretionary relief.

STATUTES AND ORDER INVOLVED

The pertinent statutes and order appear in the Appendix, *infra*, pp. 16–21.

STATEMENT

Petitioner, a native and citizen of El Salvador, was first admitted to the United States on September 9, 1948, as a permanent resident (2 R. Nov. 21, 1960, pp. 2–3).[1] On September 27, 1949, he registered under the Selective Service Act (2 R. Nov. 21, 1960, p. 3), and, prior to July 1950, was notified that he was to be called for service in the armed forces (2 R. Nov. 21, 1960, p. 6; March 24, 1961, p. 32). He returned to El Salvador in July and obtained a change of his visa to that of a nonimmigrant student so that he could finish his education "without a problem." He reentered the United States as a student on September 6, 1950 (2 R. Nov. 21, 1960, pp. 3, 6–7; Feb. 23, 1961, pp. 30–31; March 24, 1961, p. 1).

In 1952, petitioner was notified that he was to be inducted, whereupon he returned to El Salvador after

[1] The record references include designations by dates since the record for each date is separately paginated. The exhibits appear at the end of Volume 2 of the Record.

his graduation. On September 5, 1952, he re-entered the United States on a visa for permanent residence (2 R. Nov. 21, 1960, pp. 3, 6; Feb. 23, 1961, pp. 31–32). On October 10, 1952, he was notified that he was acceptable for induction (Ex. 6). On October 15, 1952, at petitioner's request, the El Salvador consulate commenced proceedings for deferment of petitioner as a citizen of El Salvador (Exs. 4, 6, 8; 2 R. Feb. 23, 1961, pp. 31–33). On October 22, 1952, petitioner was ordered to report for induction (Ex. 6). On October 28, 1952, his induction was postponed pending processing of the application for deferment (Ex. 6).

On November 26, 1952, the Director of Selective Service advised that the application for deferment had been approved. He stated, however, that if there was not already on file a request for relief as an alien which was signed by petitioner, he should be required to submit such request prior to classification in Class IV–C (Ex. 6, p. 2). On February 1, 1953, petitioner wrote to the selective service board as follows (Ex. 4):

> I received the letter in which you notified me that the application that I made for my deferment, transmitted by the Embassy of El Salvador, was approved by the Department of State, therefore I desire to be classified in class IV–C as a treaty alien.

He was so classified (Ex. 6, p. 2). On May 20, 1953, upon review of petitioner's file, petitioner's selective service board sent him a Form C–294, setting forth Section 315 of the Immigration and Nationality Act which provides that an alien relieved of service on the ground of alienage "shall be permanently ineligible"

for United States citizenship (Ex. 6). On June 15, 1953, the selective service board received a Form C–294 which petitioner had signed. The form states that "I request exemption from such military service with full knowledge of the provisions of Section 315 of the Immigration and Nationality Act that any alien who applies or has applied for exemption from training or service in the Armed Forces of the United States on the ground that he is an alien, and is or was relieved from training or service on such ground, shall be permanently ineligible to become a citizen of the United States * * *" (Ex. 5). Petitioner has subsequently remained in Class IV–C as a treaty alien (Exs. 3, 5–6; 2 R. Nov. 21, 1960, pp. 5–6).

In 1954 petitioner returned to El Salvador (2 R. Feb. 23, 1961, p. 21). On February 26, 1958, he applied for an immigrant visa, giving his residence as El Salvador and alleging that he had never applied, formally or informally, for a visa, either as an immigrant or nonimmigrant, and that he was not of an excludable class, including "persons ineligible to citizenship" (Ex. 2, Items 4, 26, 33, 37–38). On March 2, 1958, he was admitted for permanent residence on a nonquota immigrant visa (2 R. Nov. 21, 1960, p. 3).

Petitioner's last entry into the United States was on December 19, 1959, after an absence of 5 months (2 R. Nov. 21, 1960, p. 3; March 24, 1961, p. 1). An order to show cause was issued on November 14, 1960, charging that he was subject to deportation in that at the time of his last entry he was excludable as an alien ineligible to citizenship (Ex. 1). On March

24, 1961, the Special Inquiry Officer sustained the charge and ordered deportation. He found that petitioner, in testifying that he did not know what he was signing when he executed Form C–294, "was not being entirely truthful" in light of petitioner's being "an intelligent individual, a college graduate, and [in] excellent command of the English language" and having disclosed by his changes of visa and other actions that he was "fully aware of the various provisions of the Selective Service laws which might affect his liability for induction" (2 R. March 24, 1961, p. 2). The Special Inquiry Officer granted a request for voluntary departure. He denied a request, however, for exercise of discretion under Section 212(c) of the Immigration and Nationality Act which gives the Attorney General authority to allow the entry of an otherwise excludable alien when the alien is returning to an unrelinquished domicile of seven consecutive years (2 R. March 24, 1961, p. 4).[2] The Board of Immigration Appeals dismissed petitioner's appeal (2 R. July 11, 1961).

Petitioner filed a petition for review in the United States District Court for the Northern District of

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[2] With respect to petitioner's return to El Salvador in 1954 (supra p. 4), he later presented testimony before the Special Inquiry Officer that the departure was for the purpose of obtaining some "field experience" (Exs. 10–12; 2 R. Nov. 21, 1960, pp. 8–9; Feb. 23, 1961, pp. 21–22, 24, 36–38, 41, 43, 47). However, at the end of petitioner's first employment in El Salvador, he took a second employment and then a third (2 R. Nov. 21, 1960, p. 9). In 1957 he was admitted to the United States on a nonimmigrant visa for a vacation and as a delegate to a conference (2 R. Feb. 23, 1961, pp. 22, 24; March 24, 1961, p. 1).

California (1 R. August 18, 1961). Pursuant to stipulation of the parties, the petition was transferred on April 10, 1962, to the Court of Appeals for the Ninth Circuit under Section 106(a) of the Immigration and Nationality Act, as amended, 75 Stat. 650, 651 (1 R. April 10, 1962). The court of appeals affirmed the order of deportation.

ARGUMENT

The Treaty of February 22, 1926, between the United States and El Salvador provides that either party may draft, in time of war with a third country, "nationals of the other having a permanent residence within its territories and who have formally * * * declared an intention to adopt its nationality. 46 Stat. 2817, 2821.[3] This provision implies, and has been understood by both countries to mean, that all other nationals are exempt from service in the other's armed forces. In Executive Order No. 10292 of September 25, 1951, 16 Fed. Reg. 9843, *infra*, p. 20, the President provided for the deferment under the Universal Military Training and Service Act of 1951 of any alien "exempt from military service under the terms of a treaty or international agreement between the United States and the country of which he is a national."[4] Pursuant to these provisions, petitioner, a citizen of El Salvador who was then permanently residing in the United States, applied for and re-

[3] The treaty is no longer in effect, having been abrogated in 1958, after petitioner had been deferred from the draft.

[4] Executive Order 10292 remained in effect until February 15, 1956, at which time it was rescinded by Executive Order 10659, 3 C.F.R. (1956 Supp.) 59, 62.

ceived a deferment. Consequently, petitioner is ineligible for citizenship under Section 315 of the Immigration and Nationality Act of 1952, *infra*, p. 20, which provides that "any alien who applies * * * for exemption * * * from training or service in the Armed Forces * * * on the ground that he is an alien, and is or was relieved * * * from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States." As an alien ineligible for citizenship, petitioner was excludable under Section 212(a)(22) of the Act, *infra*, p. 19, when he subsequently left the United States and returned, and, having entered the United States at a time when he was excludable, he is deportable under Section 241(a), *infra*, p. 19.

1. Petitioner contends that the President was without power to issue Executive Order 10292, under which petitioner was relieved from military service, and that therefore he is not ineligible for citizenship under Section 315(a) even though he in fact applied for, and was given, a deferment.

a. Petitioner's argument that the President had no power to grant exemption to treaty aliens is based on Section 6(a) of the Universal Military Training and Service Act of 1951. Section 6(a) of the Selective Service Act of 1948, 62 Stat. 604, originally provided that certain classes of persons, including foreign representatives and consular officials residing in the United States who have not declared their intention to become citizens of the United States, "shall not be required to be registered under section 3 and should be relieved from liability for training and service

under section 4(b)." The Universal Military Training and Service Act of 1951, *infra*, p. 16, modified Section 6(a) so as to exempt all such foreign representatives and consular agents "who are not citizens of the United States * * * except that aliens admitted for permanent residence in the United States shall not be so exempted." It is evident that this section was intended to deal only with the exemption for foreign personnel having some degree of diplomatic connection. It therefore did not bar exemption, on the entirely different basis of a treaty with a foreign country, relating generally to citizens of that country residing in the United States. *Schenkel* v. *Landon*, 133 F. Supp. 305, 309 (D. Mass.).

Petitioner also relies on dicta that the power specifically given in Section 4(a) of the Universal Military Training and Service Act, *infra*, p. 16, to the President to exempt aliens other than those admitted for permanent residence must, by implication, exclude the power to exempt aliens admitted for permanent residence, including aliens required to be exempted under existing treaties.[5] However, this provision confers ad-

[5] The actual holdings in *United States* v. *Rumsa*, 212 F. 2d 927 (C.A. 7), certiorari denied, 348 U.S. 838, and *United States* v. *Gredzens*, 125 F. Supp. 867 (D. Minn.), are discussed and distinguished in *Schenkel* v. *Landon*, *supra*, 133 F. Supp. at 309-310. In *Rumsa* the application for exemption was not on the basis of a treaty but merely because Rumsa was an alien (212 F. 2d at 931); the President had not authorized relief from service to all aliens. In *Gredzens*, the registrant had failed to exhaust his administrative remedies. 125 F. Supp. at 872. His later refusal to serve was thus an offense, whether or not he would have been entitled to exemption had he made proper application. In *Petition of Rego*, 289 F. 2d 174, 175 (C.A. 3), the registrant was held not to have obtained relief from service but only a postponement.

ditional power on the President to exempt aliens who would not be exempt under other law. It does not reflect on an exemption of aliens under existing law, such as the treaty between the United States and El Salvador.

In any event, if Sections 6(a) and 4(a) of the Act do, in some way, suggest limitations on the power of the President to confer exemptions on resident aliens pursuant to a valid treaty, we submit that such a result should not be reached in the absence of the clearest expression of Congress' intent. As the district court observed in *Schenkel* v. *Landon, supra,* 133 F. Supp. at 308, in discussing Section 4(a):

> [T]he consequence is not only that treaties of the United States are abrogated but that Presidential discretion in one of the most sensitive fields of foreign relations is sharply curtailed. Were such a result intended, one would expect first that it would have been adverted to in Congress; second, that the State Department would have been heard; and third, that immediately after the passage of the Act the President's Executive Order and the Selective Service regulations would have been modified and foreign embassies notified. None of these events appears to have occurred.

The court further noted "the silence of Congress in the face of a well known history of four years of continued exemptions of resident treaty aliens." *Id.* at 309. And, as the court of appeals below stated (Pet. App. A, p. v): "Repeals [of treaties] by implication are not favored by the law. See *United States* v. *Lee Yen Tai,* 185 U.S. 213 (1902); *Johnson* v. *Browne,*

205 U.S. 309 (1907); *Cook* v. *United States*, 288 U.S. 102 (1933)."

b. Even assuming *arguendo* that the grant of an exemption to petitioner was without authority, he nevertheless is ineligible for citizenship. Petitioner (1) applied for exemption "on the ground that he is an alien" and (2) was in fact "relieved or discharged from such training or service on such ground." He thereby satisfied both requirements of Section 315 so as to bar future citizenship. *In Re Skender*, 248 F. 2d 92, 95 (C.A. 2); *Schenkel* v. *Landon*, *supra*, 133 F. Supp. at 310–311; *United States ex rel. Rosio* v. *Shaughnessy*, 134 F. Supp. 217, 218 (S.D. N.Y.); *Petition of Carvajal*, 154 F. Supp. 525, 529 (N.D. Cal.). As observed in the *Skender* case (248 F. 2d at 95–96):

> There is nothing in the language of that section to suggest that only those legally entitled to be relieved shall be debarred: it is the fact of relief, not the legal right to it, that is determinative * * *.
>
> After all, if debarment from citizenship is deemed a just fate for an alien who sought and was accorded an exemption to which he was entitled, it is not unduly harsh for one who (a) sought an exemption to which he was entitled and (b) was accorded an exemption to which he was *not* entitled. Section 315(a) did not leave it open to the appellant to attack the validity of the very classification which he sought on the ground that when made it gave him an exemption to which he was not entitled.

2. Petitioner claims (Pet. 8–10) that his case is governed by *Moser* v. *United States*, 341 U.S. 41, which held that the waiver of the right to obtain

United States citizenship, by reason of an application for exemption for military service, must have been intelligently made. On the particular facts in *Moser*, the Court found that the waiver had not been intelligent. The Court based this conclusion on the ground that the application form for exemption from service which the alien signed in *Moser* was ambiguous since the State Department had deleted, after protests by the Swiss government, the express statement "I understand that the making of this application to be relieved from such liability will debar me from becoming a citizen of the United States." *Id.* at 44. Furthermore, before the alien made application, he asserted to the local draft board an unconditional right to exemption without being barred from citizenship and was told by the Swiss Embassy that filing the application form would not have this effect. On this record, the Court accepted the district court's finding that petitioner had not signed the application for exemption knowing that he would be precluded from citizenship. *Id.* at 45.

The facts in this case are entirely different. The initial reviewing court here, the court of appeals, found that petitioner "knowingly and intentionally waived his right to become an American citizen" (Pet. App. A, p. vi). This determination is amply supported by the evidence. Petitioner concedes that he signed a form expressly stating that he requested "exemption from such military service with full knowledge of the provisions of Section 315 * * * that any alien who applies * * * for exemption from training or service in the Armed Forces * * * on the ground

that he is an alien, and is * * * relieved from training or service on such ground shall be permanently ineligible to become a citizen * * *" (see *supra*, p. 4). This statement, which was substantially the same as the sentence omitted in the form involved in *Moser*, was restored to the form in order to meet the requirements of this Court's decision.

Petitioner attempted to show before the Special Inquiry Officer his lack of understanding of what he signed. The hearing officer was justified in not crediting this testimony since petitioner is a graduate engineer of a United States school with excellent command of the English language, and had demonstrated, by his opportune change of visas back and forth from permanent to nonpermanent status, that he was fully aware of the selective service laws which might affect his liability for induction. There was totally absent here the evidence of misunderstanding which was affirmatively established by the alien in *Moser*.

Petitioner argues that he should not be held to the waiver of eligibility because, when he was first notified of his deferment, he had not signed the form containing the warning language. However, petitioner was expressly told that, while his deferment had been approved, the form had to be signed "prior to classification in Class IV-C" (Ex. 6, p. 2). His classification could, and almost certainly would, have been changed had he refused to sign the form. Petitioner therefore chose to sign the form. This was an affirmative, intelligent decision to give up prospects of future citizenship in order to avoid the dangers of service in 1953.

Petitioner suggests that his waiver was not intelligent because he did not know and was not warned that ineligibility to citizenship would also bar his future right to entry as an alien. It was enough, however, that petitioner was warned that he was giving up his right to United States citizenship. The consequences that might flow from such a decision are many and varied. An alien making such an election could not reasonably expect the government of the United States to inform him as to how it was going to treat him in every detail if he waived ever obtaining citizenship.

3. Petitioner's proceeding for review in the district court was transferred to the court of appeals upon the basis of a stipulation, in which he joined, recognizing the jurisdiction of the court of appeals under Section 106(a). Nevertheless, petitioner now contends (Pet. 11–12) that this Court should review the issue of whether the court of appeals had jurisdiction to review that part of the proceeding which related to denial of discretionary relief.

Petitioner's proceeding for review in the court below, as also in this Court, basically challenged the ruling that he was deportable. With respect to that issue, there is no question or conflict on the issue of jurisdiction; Congress has expressly provided in Section 106(a) of the Act, *infra*, p. 18, that original jurisdiction is in the court of appeals. Such jurisdiction carries with it, under the doctrine of pendant jurisdiction, the jurisdiction with respect to a concurrent challenge of the denial of discretionary relief from the deportation. *Lefson* v. *Esperdy*, 211 F.

Supp. 769, 771 (S.D. N.Y.); see *Hurn* v. *Oursler*, 289 U.S. 238; *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 380; *Taussig* v. *Wellington Fund, Inc.*, 313 F. 2d 472, 475 (C.A. 3). Accordingly, the instant case does not present to this Court the issue which is involved in *Foti* v. *Immigration and Naturalization Service*, No. 544, this Term, certiorari granted, 371 U.S. 947, as to whether, when only the denial of discretionary relief is involved, jurisdiction under Section 106(a) lies originally in the court of appeals or the district court. Therefore, we submit, disposition of the petition for a writ of certiorari need not await the decision of this Court in *Foti*.[6]

[6] Moreover, on the merits of the issue of discretionary relief, there appears no reasonable basis for petitioner's contention that he was returning to a "lawful unrelinquished domicile of seven consecutive years" and thus was entitled under Section 212(c), *infra*, p. 19, to have the Attorney General exercise discretion as to whether he should be readmitted. There was a four-year gap from 1954 to 1958, during which petitioner remained in El Salvador for three successive employments and treated a visit to the United States as a vacation and trip to a conference. And when he signed documents to come to the United States in 1958, he designated El Salvador as his residence. Petitioner later gave self-serving testimony that his absence had the purpose of gaining field experience as an engineer and that he did not know what he was stating in his documents. The Special Inquiry Officer could reasonably resolve the conflict in evidence against petitioner and find that discretionary relief was not available.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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APRIL 1963.

APPENDIX

The Universal Military Training and Service Act of 1951, 65 Stat. 75 (50 U.S.C. App. (1946 ed., Supp. V) 453), provides in pertinent part:

> SEC. 3. Except as otherwise provided in this title, it shall be the duty of every male citizen of the United States, and every other male person now or hereafter in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder.
>
> SEC. 4(a). Except as otherwise provided in this title, every male citizen of the United States and every male alien admitted for permanent residence, who is between the ages of 18 years and 6 months and 26 years, at the time fixed for his registration, or who attains the age of 18 years and 6 months after having been required to register pursuant to section 3 of this title, or who is otherwise liable as provided in section 6(h) of this title, shall be liable for training and service in the Armed Forces of the United States: *Provided,* That each registrant shall be immediately liable for classification and examination, and shall as soon as practicable following his registration, be so classified and examined, both physically and mentally, in order to determine his availability for induction for training and service in the Armed Forces: *Provided further,* That

any male alien who is between the ages of 18 years and 6 months and 26 years, at the time fixed for registration, or who attains the age of 18 years and 6 months, after having been required to register pursuant to section 3 of this title, or who is otherwise liable as provided in section 6(h) of this title, who has remained in the United States in a status other than that of a permanent resident for a period exceeding one year (other than an alien exempted from registration under this title and regulations prescribed thereunder) shall be liable for training and service in the Armed Forces of the United States, except that any such alien shall be relieved from liability for training and service under this title if, prior to his induction into the Armed Forces he had made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President; but any alien who makes such application shall thereafter be debarred from becoming a citizen of the United States.

* * * * *

SEC. 6(a). Commissioned officers, warrant officers, pay clerks, enlisted men, and aviation cadets of the Regular Army, the Navy, the Air Force, the Marine Corps, the Coast Guard, the Coast and Geodetic Survey and the Public Health Service; cadets, United States Military Academy; midshipmen, United States Navy; cadets, United States Coast Guard Academy; midshipmen, Merchant Marine Reserve, United States Naval Reserves; students enrolled in an officer procurement program at military colleges the curriculum of which is approved by the Secretary of Defense; members of the reserve components of the Armed Forces, the Coast Guard, and the Public Health Service, while on active duty; and foreign diplomatic representatives, technical attachés of foreign embassies and legations, consuls general, consuls, vice consuls and other consular agents of

> foreign countries who are not citizens of the United States, and members of their families, and persons in other categories to be specified by the President who are not citizens of the United States, shall not be required to be registered under section 3 and shall be relieved from liability for training and service under section 4, except that aliens admitted for permanent residence in the United States shall not be so exempted.

The Immigration and Nationality Act of 1952, 66 Stat. 163, as amended, 75 Stat. 651, provides in pertinent part:

> SECTION 101(a)(19) [8 U.S.C. 1101(a)(19)]:
> The term "ineligible to citizenship," when used in reference to any individual, means, notwithstanding the provisions of any treaty relating to military service, an individual who is, or was at any time, permanently debarred from becoming a citizen of the United States under Section 3(a) of the Selective Training and Service Act of 1940, as amended (54 Stat. 885; 55 Stat. 844), or under Section 4(a) of the Selective Service Act of 1948, as amended (62 Stat. 605, 65 Stat. 76), or under any section of this Act, or any other Act, or under any law amendatory of, supplementary to, or in substitution for, any of such sections or Acts.
>
> * * * * *
>
> SECTION 106(a) [8 U.S.C. (Supp. III) 1105a(a)]:
> The procedure prescribed by, and all the provisions of the Act of December 29, 1950, as amended (64 Stat. 1129; 68 Stat. 961; 5 U.S.C. 1031 et seq.) [5 U.S.C. 1031–1042] [1] shall ap-

[1] The Act of December 29, 1950, provides that the courts of appeals "shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of, all final orders" in the specified proceedings before federal agencies.

ply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 242(b) of this act or comparable provisions of any prior act * * *.

* * * * *

SECTION 212(a) [8 U.S.C. 1182(a)]:

Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * * * *

(22) Aliens who are ineligible to citizenship, except aliens seeking to enter as nonimmigrants * * *.

* * * * *

SECTION 212(c) [8 U.S.C. 1182(c)]:

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraph (1) through (25) and paragraphs (30) and (31) of subsection (a). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 211(b).

* * * * *

SECTION 241(a) [8 U.S.C. 1251(a)]:

Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;

* * * * *

SECTION 315 [8 U.S.C. 1426]:

(a) Notwithstanding the provisions of section 405(b), any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien and is or was relieved or discharged from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States.

(b) The records of the Selective Service System or of the National Military Establishment shall be conclusive as to whether an alien was relieved or discharged from such liability for training or service because he was an alien.

Executive Order No. 10292 of September 25, 1951, 16 Fed. Reg. 9843, provides in pertinent part:

* * * * * *

§ 1622.42 *Class IV–C: Aliens.* (a) In Class IV–C shall be placed any registrant who is an alien and who has not been admitted to the United States for permanent residence and who has not remained in the United States for a period exceeding one year. When such a registrant has been within the United States for two or more periods of less than one year and the total of such periods exceeds one year, he shall be deemed to have remained in the United States for a period exceeding one year. In computing the length of such periods, any portion of one day shall be counted as one full day. When any such registrant has remained in the United States for a period exceeding one year he becomes liable for training and service in the Armed Forces of the United States and shall be classified as available for military service unless he is found to be eligible for another classification for a reason other than his alien status.

(b) In Class IV–C shall be placed any registrant who is an alien and who has not been ad-

mitted to the United States for permanent residence but who has remained in the United States for a period exceeding one year and who has, prior to his induction, made application to be relieved from liability for training and service in the Armed Forces of the United States by filing with the local board an Application by Alien for Relief from Training and Service in the Armed Forces (SSS Form No. 130), executed in duplicate. The local board shall forward the original of such form to the Director of Selective Service through the State Director of Selective Service and shall retain the duplicate in the registrant's Cover Sheet (SSS Form No. 101).

(c) In Class IV–C shall be placed any registrant who is an alien and who is certified by the Department of State to be, or otherwise establishes that he is, exempt from military service under the terms of a treaty or international agreement between the United States and the country of which he is a national.

(d) In Class IV–C shall be placed any registrant who is an alien and who has departed from the United States. Such alien shall be placed in Class IV–C even though he is a delinquent but this classification shall in no way relieve him from liability for prosecution for violation of the selective service law. If any registrant so classified under this paragraph returns to the United States, his classification shall be reopened and he shall be classified anew.

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